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COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether a state court action seeking injunctive relief against both an agency of the United States [in this case the National Institutes of Health ("NIH")] and its agents and employees is subject to removal under 28 U.S.C. § 1442(a)(1) when the relief sought against such agents and employees is clearly set forth in a "Petition for Declaratory and/or Injunctive Relief," but the agents and employees are not named in the caption or body of the Petition?

LIST OF PARTIES

Respondent Institute for Behavior Resources, Inc. ("IBR") accepts petitioners' listing of the parties and notes that it is a not-for-profit District of Columbia corporation. It has no parents, subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-89

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, *et al.*,
Petitioners,

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF ON THE MERITS ON BEHALF OF RESPONDENT INSTITUTES FOR BEHAVIOR RESOURCES, INC.

OPINION BELOW

The opinion of the Court of Appeals is reported at 895 F.2d 1056. Petitioners' Appendix, A1-15, omits from the opinion of the Court of Appeals half a paragraph of text accompanying footnote 4.

STATUTE INVOLVED

28 U.S.C. § 1442(a)(1) provides:

> "(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under Act of Congress for the apprehension of punishment of criminals or the collection of revenue."

COUNTERSTATEMENT OF THE CASE

A. Background

Respondent, Institutes for Behavior Resources, Inc. ("IBR"), objects to petitioners' statement of the history of the case.[1]

In 1981, Dr. Edward Taub, the chief of the Behavioral Biology Center of the Institutes for Behavior Resources, Inc.[2] was studying the capacity of monkeys to learn to use a limb after nerves had been severed. Funded by the National Institutes of Health ("NIH"), the project amplified Dr. Taub's earlier research in this area and attempted to discover benefits for the rehabilitation of human patients suffering from a serious neurological injury such as stroke. 799 F.2d at 936.

[1] A more accurate statement of the facts can be derived from the Fourth Circuit opinion in *International Primate Protection League* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), where similar prayers for relief to those in this action were asserted by two of the petitioners; from the IBR Brief in Opposition to the Petition for a Writ of Certiorari to the Fourth Circuit; from the decision of the Supreme Court of Maryland in *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983); from the opinion below; from the Declaration and Second Declaration of Dr. Raub, IBR App. C; R. 0102-5; from the affidavit of Dr. Brady, NIH App. B; and from the affidavit of Dr. Gerone, NIH App. A. Contrary to the impression created by petitioners, the Department of Health and Human Services' Departmental Grant Appeals Board exonerated Dr. Taub as to all charges of animal cruelty or failure to provide needed veterinary care. HHS-GAB, Decision No. 538, May 31, 1984.

[2] IBR was previously named "Institute for Behavioral Research, Inc."

Petitioner Alex Pacheco, then an undergraduate student, who, unknown to Dr. Taub, had founded People for the Ethical Treatment of Animals ("PETA"), falsely claimed to be interested in a laboratory science career and offered to work as a volunteer for Taub at the IBR animal laboratory facility in Silver Spring, Maryland. Dr. Taub gave Pacheco keys to the premises, and Pacheco came regularly to the laboratory during the summer of 1981. Pacheco caused the Montgomery County Police Department to charge Dr. Taub with animal cruelty under Section 59 of the Maryland Code.

The police obtained a search warrant from the Circuit Court for Montgomery County and on September 1, 1981, seized from IBR the 17 monkeys in the experiment. Pursuant to court order they were returned to IBR. Subsequently, 17 criminal charges were filed against Dr. Taub alleging 119 violations of the Maryland animal cruelty statute.

On October 9, 1981, the Circuit Court for Montgomery County, without opposition from IBR, the owner of the monkeys, directed their transfer to an NIH facility in Poolesville, Maryland.[3] The order was to remain in effect "until further Order of this Court or the termination of the pending criminal prosecution against Dr. Taub, whichever occurs first." 799 F.2d at 936.

Dr. Taub stood trial in November 1981 in the District Court for Montgomery County, which entered orders of conviction for failure to provide "necessary veterinary care" for six monkeys and acquitted Dr. Taub of all the other 113 charges. Fearing that the court order on custody of the monkeys would expire with an acquittal, PETA sought to prevent the return of any animals to IBR. The International Primate Protection League ("Primate League"), PETA and others filed a bill of complaint on December 3, 1981 in the Circuit Court for Montgomery County in which they purported

[3] Contrary to the statement at page 2 of petitioners' Brief, petitioners did not deliver the monkeys to NIH.

to speak for "their own and class interests and as the next friends of seventeen (17) non-humans primates." Primate League alleged that a civil inquiry would demonstrate IBR violations of the Maryland animal cruelty laws and the federal Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* Primate League asked the court to designate it and the other plaintiffs as guardians of the monkeys, and to preclude IBR from regaining possession. 799 F.2d at 936.

On the basis of the federal question presented, NIH removed the case to the U.S. District Court for the District of Maryland pursuant to 28 U.S.C. § 1441(a).

Dr. Taub appealed his six District Court convictions to the Circuit Court for Montgomery County, where a jury, after a "trial de novo," returned a guilty verdict against Taub on one count (failure to provide necessary veterinary care to one monkey). The Court of Appeals of Maryland then granted a writ of certiorari and in August 1983 reversed the conviction, holding that Article 27, Section 59 of the Maryland code did not apply to an institution conducting medical research pursuant to a federal program. *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983).

After Dr. Taub was acquitted of all criminal charges, NIH continued to act as custodian of the monkeys with the consent of their owner, IBR. Second Declaration of William F. Raub, R. 0102-3.[4]

The removed Maryland suit thus became the only remaining litigation over custody of the monkeys. On the motion of IBR in 1985, the Maryland federal district

[4] Petitioner's Appendix to its Petition for a Writ of Certiorari is hereinafter cited as "Pet. App. ——." Respondent Institutes for Behavior Resources, Inc.'s Appendix to its opposition to the Petition is cited as "IBR App. ——." The NIH Appendix to its opposition to the Petition is cited as "NIH App. ——." Matters included in those appendices have not been included in the Joint Appendix ("J.A. ——") pursuant to Supreme Court Rule 26.1.

court dismissed the case for lack of standing on the part of the plaintiff.

B. The Appeal to the Fourth Circuit

In June 1986, Primate League appealed to the Fourth Circuit. While the appeal was pending, NIH transferred the remaining 15 monkeys to the Delta Regional Primate Research Center in Covington, Louisiana. IBR App. 7a-8a. Five of the monkeys, which had not been surgically altered, were later transferred to the San Diego Zoo. Pet. 4. For the care of the surgically altered animals, and one control animal, NIH entered into a contract with Tulane University through its School of Medicine ("Tulane"), which operates the Delta Center. Under the contract, the Delta Center assists NIH in its role as custodian for the monkeys. Gerone Affidavit, NIH App. 1a; Declaration of William F. Raub, IBR App. C, 8a. para. 5; Second Declaration of William F. Raub, R. 0102-5.

The Fourth Circuit affirmed the District Court, stating in part:

> "In this case we must decide whether a group of private individuals may challenge a medical researcher's compliance with federal standards for the care of laboratory animals. Because we find that the plaintiffs lack standing to bring such a lawsuit, we affirm the judgment of the district court in its dismissal of this action."
>
> "To imply a cause of action in these plaintiffs might entail serious consequences. It might open the use of animals in biomedical research to the hazards and vicissitudes of courtroom litigation. It may draw judges into the supervision and regulation of laboratory research. It might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering. To risk consequences of this magnitude in the absence of clear direction from the Congress would be ill-advised. In fact, we are persuaded that Congress intended that the independence of medical research be

respected and that administrative enforcement govern the Animal Welfare Act." 799 F.2d at 935.

Primate League then petitioned this Court for a writ of certiorari which was denied in 1987. 481 U.S. 1004 (1987).

In 1988, based on the recommendation of a panel of independent experts in veterinary care, primate behavior, and neurology, NIH determined that three of the monkeys should be euthanized because of the amount of distress they were experiencing. Plans were made to humanely euthanize them on December 28-31, 1988. Memorandum in Opposition to Motion to Compel, R. 00414 (August 11, 1989), at 3. R. 0201-2. In furtherance of its statutory research mission, NIH hoped to gain, through the procedure and subsequent autopsy of the animals, knowledge that might lead to improvements in rehabilitation therapy for individuals who have suffered brain or spinal cord damage. *International Primate Protection League* v. *Tulane Educational Fund*, 895 F.2d 1056, 1058 (5th Cir. 1990). Second Declaration of William F. Raub, R. 0102-5. Dr. Joseph V. Brady, Chairman of the Board of IBR, strongly supported the research to be conducted in connection with the euthanasia. NIH App. B, para. 5.

C. The Proceedings Below

To preclude the euthanasia and subsequent experimentation, on December 28, 1988, Primate League, PETA, and others filed suit in the Civil District Court for the Parish of Orleans in the State of Louisiana again seeking custody of all the surviving Silver Spring Monkeys, and injunctive relief against the named defendants, the Administrators of the Tuane Educational Fund, the National Institutes of Health, and the Institutes for Behavior Resources. Pet. App. A-32, 39. The Petition also sought injunctive relief against the "agents and officers of NIH, [and] IBR." 895 F.2d at 1058; Pet. App. A-30-32.

The Louisiana state court issued a temporary restraining order against the only party then served which provided as follows:

> "It is ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys', placed in their keeping by the National Institute of health and/or the Institute for Behavioral Research." IBR App. A.

The United States Attorney accepted service on behalf of NIH and removed the case, under the authority of 28 U.S.C. § 1442(a)(1), to the United States District Court for the Eastern District of Louisiana. J.A. 1.[5] A second amended Petition for Removal was filed on January 20, 1989, again relying on 28 U.S.C. § 1442(a). A motion to remand was denied. Pet. App. A-17. After removal, petitioners moved for and secured a temporary restraining order ("TRO") from the district court which provided,

> "IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys'." IBR App. B.

As the district court extended the temporary restraining order beyond the 20 days permitted by Fed. R. Civ.

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[5] An "Amended Petition for Removal" was filed on January 13, 1989 "to correct a typographical error," changing the basis for removal to 28 U.S.C. § 1441(a). J.A. 16. From the context this change appears also to involve a typographical error. In any event, the United States contended in its Opposition to Plaintiff's Motion to Remand that the removal was proper pursuant to 28 U.S.C. § 1442(a), J.A. 21.

P. 65(b), the extended TRO became the functional equivalent of a preliminary injunction, appealable as such under 28 U.S.C. § 1292(a)(1). 895 F.2d at 1058.

The court below, concluding that the removal was proper, that the federal interest was adequately established, and that petitioners did not meet the standing requirement of Article III, vacated the district court order and dismissed the entire case. 895 F.2d at 1058-61.

After Primate League's Motion to Stay the Mandate was denied, Pet. App. A-26, on July 6, 1990, NIH performed the euthanasia and subsequent experiments on the three monkeys. Pet. 4 n.2, NIH Opposition 5. Earlier, another monkey had been euthanized and two had died. NIH Opposition 5. Four Silver Spring Monkeys continue to be cared for by the Delta Center under contract with their custodian NIH, with the consent of IBR, their owner. *See* Declaration of Dr. Joseph V. Brady, NIH App. B; Second Declaration of William F. Raub, R. 0102-5. Custody of these surviving monkeys is within the scope of the relief sought in the Petition for Declaratory and/or Injunctive Relief. Pet. App. A-32, 39.

On November 26, 1990 this Court granted the Petition for a Writ of Certiorari limited to the first question presented, namely the propriety of the removal of the case from the state court to the federal court.

SUMMARY OF ARGUMENT

1. The purpose of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), is to protect federal officers from interference by hostile state courts. To justify removal there must be a showing that the officer was acting under the laws of the United States and that the conduct at issue was necessary and proper in the performance of his duties. The removal is of the entire case, including state law issues. The removal protects the sovereign's interest in having the defense of official immunity, and other defenses, heard in federal court.

2. The plain language of the Section 1442(a)(1) phrase, "any officer of the United States or any agency

thereof," permits an agency as well as an officer of the United States to remove. [The statute separately also permits removal by "a person acting" under a federal officer. The meaning of this phrase and its applicability to NIH and to Tulane is considered in Summary of Argument paragraph No. 6 and in Section VI of this brief.] Petitioners' argument that officers of the United States and *officers of* agencies are the only parties who can remove incorrectly assumes that some officers of federal agencies are not officers of the United States, rendering one phrase of the statute superfluous. The IBR interpretation gives independent meaning to each phrase. The Court, on the basis of precedent, need not embrace a result so at odds with the purpose of the statute which would permit thwarting, through the expedient of a pleading device, congressional intent in having suits involving the official conduct of agents of the United States heard in federal court.

3. The removal in this case was proper so that the unnamed officers and agents of NIH, such as the Acting Director of NIH, Dr. Raub, against whom petitioners sought and secured relief, could be defended in federal court.

4. Even if an agency cannot remove in all circumstances, when, as here, job-related claims of federal employees are at issue, removal should always be allowed when equitable relief is sought against government employees.

5. The Third Circuit's opinion in the *Lovell* case, the only circuit court decision stating that agencies cannot remove, involved litigation in which at the time of remand there was no federal interest and no possibility of relief against any officer or employee of the United States. The language in the opinion on which petitioners rely can be regarded as dicta or an alternative holding. The *Lovell* court in effect rewrote the statute by adding the word "of" before the words "any agency."

6. Both NIH and Tulane were "persons" within the meaning of Section 1442(a)(1) acting under an officer of the United States. NIH acted under the Secretary of Health and Human Services. Tulane acted under contract with the Acting Director of NIH. Consequently, both were entitled to remove.

7. Petitioners ignore the fact that they filed suit seeking relief against "natural persons," agents and officers of NIH. This consideration alone justifies the removal.

8. Primate League has challenged the Fifth Circuit opinion on grounds not within the certiorari grant. The grant was only as to issue number one, the removal. They have sought to argue jurisdictional issues and the sufficiency of the federal interest. Even if all their arguments are considered, they are nevertheless incorrect and misstate the record.

ARGUMENT

I. THE PURPOSE OF THE FEDERAL OFFICER REMOVAL STATUTE, 28 U.S.C. §1442(a)(1), IS TO PROVIDE BOTH FEDERAL OFFICERS AND THE FEDERAL GOVERNMENT WITH A FEDERAL FORUM IN WHICH TO DEFEND OFFICIAL ACTION.

The history and purpose of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), is succinctly summarized in *Willingham* v. *Morgan*, 395 U.S. 402, 404-7 (1969).

"The first removal statute was included in an 1815 custom statute." *Id.* at 405. "It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done 'under color' of the statute. Obviously, the removal provision was an attempt

to protect federal officers from interference by hostile state courts." *Id.* "A new group of removal statutes came with the Civil War, and they were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws. Rev. Stat. § 643 (1874); Judicial Code of 1911, § 33, 36 Stat. 1097. Finally, Congress extended the statute to cover all federal officers when it passed the current provision as part of the Judicial Code of 1948. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947)." *Id.* at 405-6. The 1947 legislative history merely notes,

> "The revised subsection (a)(1) is extended to apply to all officers and employees of the United States or any agency thereof. Section 76 of title 28, U.S.C., 1940 ed., was limited to revenue officers engaged in the enforcement of the criminal or revenue laws. * * * Changes were made in phraseology." H.R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947).

As stated in *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880), the federal government

> ". . . can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, if their protection must be left to the action of the State court, the operations of the general government may at any time be arrested at the will of one of its members." 100 U.S. at 263.

Under the removal statute, if the "federal officers can raise a colorable defense arising out of their duty to enforce federal law," *Willingham* v. *Morgan*, *supra* at 406-7, the right of removal "is made absolute . . . ." *Id.* at 406. "[T]he removal statute is an incident of federal supremacy . . . ." *Id.* at 405.

The "under color of office" requirement generally means that the federal officer seeking removal must demonstrate an official function and the existence of a "colorable federal defense." *Mesa* v. *California*, 489 U.S. 121 (1989). This requires a showing that the federal officer was acting under the laws of the United States and that the conduct was necessary and proper in the performance of those duties. *In re Neagle*, 135 U.S. 1 (1889).

Unlike federal question removal under 28 U.S.C. § 1441, where the federal question must appear on the face of the complaint, under Section 1442(a)(1) the case can be removed even if the federal court would not have original jurisdiction over the action, and the federal interests appear only in the removal petition. *Poss* v. *Lieberman*, 299 F.2d 358, 359 (2d Cir. 1962), *cert. denied*, 370 U.S. 944 (1962).

The statute confers jurisdiction on the federal court to hear the case as well as the right of removal. *S. S. Silberblatt, Inc.* v. *East Harlem Pilot Block*, 608 F.2d 28, 35 (2d Cir. 1979). The removal is of the entire case though only one of its controversies involves a federal official, *IMFC Professional Serv. of Florida, Inc.* v. *Latin Am. Home Health, Inc.*, 676 F.2d 152, 158 (5th Cir. 1982), and only the federal official removes, *Bradford* v. *Harding*, 284 F.2d 307, 310 (2d Cir. 1960). Removal "does not revise or alter the underlying law to be applied," *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981). Removal is proper even when only state law issues are pleaded by the plaintiff. *Mir* v. *Frostburg*, 646 F.2d 342, 344 (9th Cir. 1980). Procedure after removal is governed by the Federal Rules of Civil Procedure, Fed. R. Civ. P. 81(b), and by 28 U.S.C. §§ 1446, 1447, 1448, 1449, 1450.

Removal is proper for actions commenced in state court that potentially expose a federal official to a civil or criminal penalty not only for acts performed in the past under color of office, but also with respect to "civil matters that seek to either prohibit or require certain

actions of a federal official in the future." *Florida* v. *Cohen*, 887 F.2d 1451 (11th Cir. 1989).

To avoid the defense of sovereign immunity, usually suits to enjoin governmental conduct are nominally brought against officers or agents of the government alleging that the officer or agent was acting in excess of his statutory authority, or that his conduct in the particular matter was constitutionally void. *See, e.g., Malone* v. *Bowdoin*, 369 U.S. 643 (1962); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703-5 (1949); *Blackmar* v. *Guerre*, 342 U.S. 512, 515 (1952).

The United States need not be named as a party defendant in addition to the federal official to involve the sovereign. *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Dugan* v. *Rank*; 372 U.S. 609, 620 (1963). As stated in *Portsmouth Redevelopment & Housing Auth.* v. *Pierce*, 706 F.2d 471, 473 (1983),

> "it is not necessary that the United States be denominated as a party. An action against a federal agency or official will be treated as an action against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act.' *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963)."

The removal thus permits "the defense of official immunity [to be] tried in federal court." *Willingham* v. *Morgan*, *supra* at 407. Both the federal employee and the federal government "require the protection of the federal forum." *Id.*

II. THE PLAIN LANGUAGE OF SECTION 1442(a)(1) PERMITS AN AGENCY TO REMOVE.

Section 1442(a)(1) provides, in relevant part, that an action commenced in state court may be removed to federal district court by "[a]ny officer of the United States or any agency thereof . . . for any act under color of such

office . . . ." 28 U.S.C. § 1442(a)(1). "[T]he right of removal under § 1442(a)(1)," this Court has observed, "is made absolute whenever a suit in a state court is for *any act* 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court." *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1968) (emphasis added).

In this case, petitioners contend that, despite its sweep, Section 1442(a)(1) does not permit removal of an action challenging indisputably federal acts, because the only federal defendant petitioners chose to name in the caption of their complaint is a federal agency, not a federal officer. Notwithstanding the facts that (1) NIH is, as a matter of federal law and the Supremacy Clause, immune from suit in state court, (2) NIH may not, as a matter of federal law, be sued in its own name, and (3) NIH cannot act except through its officers and employees, petitioners insist that they can foreclose federal adjudication of NIH's official defenses to this suit through the simple expedient of failing to identify by name the federal officers they seek to restrain. Indeed, petitioners argue that the plain language of the statute compels acquiescence in such circumvention of the statute. As respondent IBR demonstrates below, the language of the statute does not require any such self-defeating construction. Moreover, this Court should reject any reading of the statute that leads to so unreasonable a result.

A. Petitioners' "Plain Language" Argument Fails

Ignoring the purposes of the removal provision altogether, petitioners focus exclusively on the caption and syntax of Section 1442(a)(1), which, they argue, can only be read to permit federal officers, or those acting under the direction of such officers, to remove state court actions challenging federal activities. The language of the statute, however, is hardly so clear as to compel the result petitioners seek. Subsection (1) identifies the juridical "person" who may remove an action under subsection (a) as "[a]ny officer of the United States *or any*

agency thereof." 28 U.S.C. § 1442(a)(1) (emphasis added). On its face, this language does not plainly preclude the possibility that an agency is entitled to invoke the protection of a federal forum; on the contrary, it can be read literally to identify two entities: federal officers *and* federal agencies. *See* Wright & Miller, *Federal Practice and Procedure* § 3727, at 458 (1985 ed.) ("Wright & Miller") (noting that, while syntax of the section supports the construction that agencies cannot remove, "it also would support the contrary conclusion"). As petitioners construe it, the statute, in effect, permits removal by "[a]ny officer of the United States or *of* any agency thereof." *See* Pet. Brief at 9. This is not the language Congress employed.

[The statute separately also permits removal by "a person acting under" a federal officer. The meaning of this phrase and its applicability to NIH and to Tulane are considered in Section VI, *infra*, p. 34.]

Petitioners insist, however, that when the opening clause of subsection (1) is read together with the clause that follows it, the subsection as a whole can only be understood to permit removal by federal officers. Thus, they note, Congress provided for removal by "[a]ny officer of the United States or any agency thereof, or person acting under *him*." *See* Pet. Brief at 10. The personal pronoun, petitioners submit, makes plain that the opening clause refers only to officers—either of the United States or of federal agencies—but not to federal agencies themselves. *Id.* This argument requires rewriting he statute. See Section V, *infra*, p. 31.

Petitioners' argument has additional difficulties: it necessarily assumes, illogically and incorrectly, that some officers of federal agencies are *not* officers of the United States. Indeed, without this illogical assumption, the language "or any agency thereof" is entirely superfluous, a result that militates strongly against petitioners' "plain meaning" construction. *See Mackey* v. *Lanier Collection Agency*, 486 U.S. 825, 839 n.14 (1988) ("the suggestion

that Congress intentionally adopted, at a single time, two separate provisions having the same meaning . . . calls a particular statutory interpretation into question"); 2A Sutherland, *Statutes and Statutory Construction* § 46.06 (Sands 4th ed. 1984) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute").

Section 1442(a)(1) does not define the terms "agency" or "officer" of the United States, and the terms themselves are not self-defining. Accordingly, this Court necessarily must look beyond the plain language of the statute to ascertain their meaning. Section 451 of title 28 provides that, for purposes of the judicial code, the term "agency" includes

> "any department, independent establishment, commission, administration, authority, board or bureau *of the United States* or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 28 U.S.C. § 451 (emphasis added).

Clearly, officers of "any department, independent establishment, commission, administration, authority, board or bureau *of the United States*" must be officers of the United States.[6] Although less clear on its face, the phrase "any corporation in which the United States has a proprietary interest" is limited to those corporations that perform governmental functions and are owned and/or managed by the United States itself;[7] it does *not* include

[6] Several of the terms employed in Section 451 are themselves defined in the Government Organization and Employees Act, 5 U.S.C. § 101 *et seq.* This Act, which defines the executive and military "department[s]" (§§ 101 and 102), "government corporation" (§ 103), and "independent establishment" (§ 104), leaves little doubt that the officers of such entities are necessarily officers of the United States.

[7] *See In re Hoag Ranches*, 846 F.2d 1225, 1227-29 (9th Cir. 1988) (fact that a corporation is federally chartered or is a federal instrumentality is not dispositive under Section 451; a privately owned and operated Production Credit Association, despite its federal origins, is not a federal agency); *Rauscher Pierce Refres, Inc.* v. *FDIC*, 789 F.2d 313, 315-16 (5th Cir. 1986) (FDIC is a federal agency: its Board is appointed by the President and includes the Comptroller of the Currency; the Secretary of the Treasury oversees aspects of its finances; and its management is "inextricably intertwined in the federal government"); *Government Nat'l Mortgage Ass'n* v. *Terry*, 608 F.2d 614, 618-20 (5th Cir. 1979) ("Ginnie Mae" is part of the Department of Housing and Urban Development ("HUD"), "is completely controlled by HUD," and is financed by the federal government, is a federal agency); *Walton* v. *Howard University*, 683 F. Supp. 826, 830-31 (D.D.C. 1987) (American Red Cross's independence from governmental control places it outside scope of Section 451 definition of agency).

"those corporations in which the interest of the Government is custodial or incidental."[8] Consistent with this definition, Section 103 of title 5 provides that a "government corporation" is "a corporation owned or controlled *by the Government of the United States*," 5 U.S.C. § 103 (emphasis added), and Section 105 in turn explains that a "government corporation" is an "Executive agency." *Id.* § 105. These definitions leave little room for Primate League's assumption—critical to its construction—that some officers of a United States "agency" are nevertheless *not* officers of the United States.

The contrary conclusion, moreover, is buttressed by the Administrative Procedure Act ("APA") and the federal civil service laws. The APA, which petitioners themselves look to for interpretive guidance,[9] and which, like the removal statute, concerns the manner and extent to which the actions of federal agencies may be challenged in the courts,[10] defines "agency" as "each authority of the gov-

[8] 18 U.S.C. § 6, Historical and Revisions Notes. The Revisions Notes to Section 451 explain that "[t]he definitions of agency and department [in Section 451] conform with such definitions in section 6 of revised title 18."

[9] *See* Pet. Brief at 10.

[10] *See* 5 U.S.C. §§ 551-559, 701-706. Congress, moreover, enacted the APA in 1946, just two years before passing the current removal provision. Given the temporal proximity and related subject matter

ernment of the United States." 5 U.S.C. § 551(1).[11]

Officers of such authorities of the United States must themselves be officers of the United States itself. Indeed, this fact is confirmed by the federal civil service laws, which define an "officer," other than a judicial or military officer, as

> "an individual who is—(1) required by law to be appointed in the civil service by . . . the President . . . [or] the head of an Executive agency . . . (2) engaged in the performance of a Federal function under authority of law or an Executive act; and (3) subject to the supervision of [the appointing] authority . . . while engaged in the performance of the duties of his office." 5 U.S.C. § 2104.

It is inconceivable that an officer of a federal agency, appointed by the President or the head of an executive agency performing a federal function pursuant to federal

of the two enactments, it is reasonable to look to the APA for guidance as to the meaning of the term "agency." *Cf. Communications Workers of Am.* v. *Beck*, 108 S. Ct. 2641, 2648-49 (1988) (identical language in statutes with like purposes should be construed in like manner).

[11] The Act excludes from its definition "(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia . . . (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined thereby; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions [concerning federal insurance of home mortgages or exercised by the Administrator of General Services]." 5 U.S.C. § 551(a). Indeed, these exclusions bolster reliance on the APA, for the most significant "exceptions" are paralleled by specific "inclusions" in the removal statutes. Thus Section 1442(a)(3) and (4) addresses removal of actions involving two entities—Congress and the courts of the United States—that are excluded from the APA's definition of agencies. Similarly, Section 1442a mirrors the APA by permitting removal in actions involving authority exercised "under a law of the United States respecting the armed forces thereof, or under the law of war." 28 U.S.C. § 1442a.

law and subject to the supervision of the President or the head of an executive agency, would *not* be an officer of the United States.

Taken together, these definitions reveal the fundamental flaw in petitioners' construction of subsection (a)(1): while Primate League insists that the phrase "or any agency thereof" refers to *officers* of federal agencies, such persons are entirely subsumed within the phrase "[a]ny officer of the United States"; petitioners' "plain meaning" interpretation thus renders a phrase of the statute completely superfluous. The interpretation urged by IBR, on the other hand, avoids this redundancy and thereby gives independent meaning to each phrase.

B. The Court Should Construe Section 1442(a)(1) so as To Avoid a Result Completely at Odds with the Statute's Purpose

As respondent IBR demonstrated above, the plain language of the statute does not compel a construction completely at odds with its purpose. Even if the Court determines, however, that the statutory language favors petitioners' Construction, the Court should nevertheless construe the provision to permit removal by federal agencies.

This Court has recognized on a number of occasions that "[w]here the literal reading of a statutory term would compel an odd result," or a result that is "difficult to fathom," it is proper to "search for other evidence of congressional intent to lend the term its proper scope." *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558, 2566 (1990) (citations and internal quotation marks omitted); *see also Green* v. *Bock Laundry Mach. Co.*, 109 S.Ct. 1981, 1994 (1989) (Scalia, J., concurring) (where statute, "if interpreted literally, produces an absurd . . . result[,]" the Court's "task is to give some alternate meaning" to the statutory language . . . "that avoids this consequence"); *United States* v. *Public Utilities Comm'n of California*, 345 U.S. 295, 315-16 (1953) ("when the literal words would bring about

an end completely at odds with the purpose of the statute," courts may properly rely on legislative purpose and intent). As Judge Learned Hand observed, although

> "the words used, even in their literal sense, are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).[12]

The disposition that follows from petitioners' "plain language" construction is as 'unfathomable" as any that has led this Court to reject literal interpretations of statutes in the past. There can be no dispute (1) that NIH is a federal agency enjoying sovereign immunity from suit in state court;[13] (2) that NIH may not be sued in its own name;[14] (3) that the actions petitioners sought to enjoin were acts taken by, or at the direction of, federal officers acting under color of their office; and (4) that, had petitioners named as defendants the officers whose acts or directions they sought to enjoin, such as Dr. Raub, he could have removed the suit to federal court. Nor is there any question that Section 1442(a)(1), as an incident of federal supremacy, is designed to prevent state law and state court interference with federal activities by ensuring that the defense of official immunity can be raised and decided in federal court in accordance with federal law.

[12] *See also Watt* v. *Alaska*, 451 U.S. 259, 266 (1981) ("[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect").

[13] *See, e.g., Dugan* v. *Rank*, 372 U.S. 609, 620-22 (1963). As the United States Department of Justice has noted, the Administrative Procedure Act contains a waiver of sovereign immunity that may apply to the activities of NIH, but that waiver applies only to suits brought in federal court. Brief for National Institutes of Health in Opposition to Petition for Certiorari at 12 & n.11.

[14] *See Blackmar* v. *Guerre*, 342 U.S. 512 (1952) (agency may not be sued in its own name in the absence of statute authorizing such suit). There is no such authorization with respect to NIH.

If Section 1442(a)(1) is nevertheless read to preclude removal by federal agencies, the entire purpose of the statute can be thwarted at the whim of plaintiffs. Under such a reading, petitioners' improper designation of NIH as defendant will prevent the federal officers whose actions or directions petitioners sought to and did restrain from gaining access to the federal forum Congress unmistakably intended to provide. Moreover, it will leave to the state courts the determinations whether NIH can be sued in its own name, and whether NIH officers and those acting at their direction are acting pursuant to a grant of federal authority that precludes the injunctive relief petitioners seek. These are all matters that Congress undeniably intended to have adjudicated in federal courts under federal law. It is simply inconceivable that Congress could have intended, or even have envisioned, that the language it employed in Section 1442(a)(1) would so readily permit circumvention of the statute and frustration of the policies underlying it.

In a comparable setting, this Court recently declined to apply a statute according to its literal terms where to do so would allow a plaintiff to thwart congressional intent through the expedient of a pleading device. In *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304, 2311 (1989), the Court ruled that state officials are not subject to suit under 42 U.S.C. § 1983, which imposes liability on "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" causes a deprivation of another's civil rights. Acknowledging that "state officials literally are persons," the Court reasoned that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . [and,] [a]s such, it is no different from a suit against the State itself." *Id.* Having previously concluded that states are

not "persons" within the meaning of the statute, the Court concluded that there was "no reason to adopt a different rule in [suits against state officers], *particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.*" *Id.* (emphasis added).

The present case permits the exact obverse situation. Petitioners' suit for injunctive relief here, though nominally against NIH itself, is also a suit to restrain the acts of NIH "agents, officers, representatives, employees." Pet. App. A-32. Because it is clear that a suit against the latter would be removable, there is no reason to adopt a different rule here and thereby allow petitioners to circumvent Congress' intent through a mere pleading device.

Indeed, departing from an unreasonable interpretation of the statute is even more justified here than it was in *Will*. As part of the same 1948 revisions to the Judicial Code that created the present version of Section 1442(a)(1), Congress revised Section 1445, the "nonremoval" provision pertaining to Federal Employee Liability Act suits against railroads. The revision made clear that such suits remained nonremovable when brought against a bankrupt railroad's receiver or trustee who, technically, is an "officer of the courts of the United States" within the meaning of Section 1442(a)(1). The revisers explained that "the subject matter *rather than legalistic distinctions as to the identity of the parties* is made [the] determinative consideration." *See* 28 U.S.C. § 1445, Revision Notes (emphasis added). The same regard for substance rather than "legalistic distinctions" that prompted the amendments to Section 1445—and that drove this Court's analysis in *Will*—dictate that Section 1442(a)(1) be construed to permit removal by federal agencies as well as their officers.

Petitioners, moreover, have identified nothing in the legislative history or purpose of the statute that justifies the self-defeating construction they urge. Relying on

Professor Moore's treatise, petitioners argue that because Section 1442(a)(1)'s antecedents applied only to revenue officers, the statute is designed to protect federal officers alone from interference by hostile state courts. *See* Pet. Brief at 11. This argument, however, ignores the obvious fact, articulated by this Court over a century ago, that the federal government "can act only through its officers and agents," and that interference with the federally authorized activities of these officers effectively "arrest[s]" the "operations of the general government" itself. *Tennessee* v. *Davis*, 100 U.S. at 263. Indeed, even courts that have adopted petitioners' construction have acknowledged that

> "the distinction between the officer and the agency represented by him is an artificial one, resting more on form than substance, and . . . the same principles which permit the officer . . . to remove *should apply equally well to the . . . agency itself.*" *Lance International, Inc.* v. *Aetna Cas. & Sur. Co.*, 257 F. Supp. 349, 355 (S.D.N.Y. 1967) (emphasis added).

See also Lovell Mfg. Div. of Patterson-Erie Corp. v. *Export-Import Bank of the United States*, 843 F.2d 725, 733 (3d Cir. 1988) ("sound policy arguments . . . favor . . . allowing federal agencies . . . to have an automatic right of removal").[15]

There can thus be little dispute that the purposes underlying Section 1442(a)(1) justify removal by agencies themselves.[16] Grasping for some "policy" that justifies

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[15] *See also* Wright & Miller § 3727, at 458-59 (while "several decisions have held that . . . the statute applies only to officers, and not to federal agencies as such . . . it is unlikely that this was Congress' intention in enacting the statute").

[16] The only other rationale courts have advanced in support of a contrary interpretation is that Congress can be said to have excluded agencies from Section 1442(a)(1) because it "has already provided ample protection against tort suits for its agencies . . . in the Federal Tort Claims Act, and any other claims which could be brought in state court are barred by sovereign immunity." *Gensplit Finance Corp.* v. *Foreign Credit Ins. Ass'n*, 616 F. Supp. 1504, 1510 (E.D. Wis. 1985); *see also City of Alma* v. *Bell, Galyardt*

the result they seek, petitioners contend that "a liberal interpretation of section 1442(a)(1) that would allow removal whenever a federal agency is involved threatens to broaden removal jurisdiction far beyond original jurisdiction." Pet. Brief at 16. This Court, however, has already disposed of this argument. In *Mesa* v. *California*, 489 U.S. 121, 129 (1989), the Court explained that § 1442(a)

> "cannot independently support Art. III 'arising under' jurisdiction. *Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes.* The removal statute itself merely serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged." *Id.* at 136 (emphasis added).

Indeed, it was for this reason that the Court concluded that a state suit cannot be removed pursuant to Section

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& Wells, Inc., 606 F. Supp. 686, 690 (D. Neb. 1985) (same); *Lowe* v. *Norfolk & Western Ry. Co.*, 529 F. Supp. 491, 494 (S.D. Ill. 1982) (same). The difficulty with this argument is that it leaves determination of the federal sovereign's immunity to state courts, whereas Congress, in § 1442(a)(1), "decided that . . . the Federal Government . . . require[s] the protection of a *federal forum*." *Willingham* v. *Morgan*, 395 U.S. at 407 (emphasis added). Perhaps recognizing this, the courts in *City of Alma* and *Lowe* effectively adjudicated the federal agencies' claims of immunity by ruling that, although removal under § 1442(a)(1) and § 1441(a) was improper, the claims against the agencies had to be dismissed rather than remanded because the state courts lacked jurisdiction. *City of Alma*, 606 F. Supp. at 691-92; *Lowe*, 529 F. Supp. at 496-97. However, the correctness of such dispositions is doubtful. Sovereign immunity is not a jurisdictional defense but is properly asserted, in terms of a failure to state a cause of action. *New Jersey Dep't of Envtl. Protection* v. *Gloucester Envtl. Management*, 719 F. Supp. 325, 335 (D.N.J. 1989). Were the court below to have dismissed NIH on the ground that the state court did not have jurisdiction over it, and remanded the non-federal defendants to state court, it would have been a useless act since Tulane itself then could have removed the entire action back to federal court. See Section VII, *infra*, at p. 34.

1442(a)(1) simply because it is brought against a federal defendant; rather, removal under the statute "must be predicated upon averment of a federal defense." *Id.* at 139. Construing Section 1442(a)(1) to permit removal by federal agencies, therefore, will work no expansion in the jurisdiction of the federal courts. As with other federal defendants, an agency can properly remove only where, as here, there is a federal defense to the plaintiff's state law claims.

Finally, petitioners suggest that removal is improper here because this case presents "issues of state law that are within the peculiar province of the Louisiana state courts to resolve." Pet. Brief at 17. This argument completely misapprehends the purpose and operation of Section 1442(a)(1). As a matter of federal supremacy, Congress has determined that when a federal defendant raises a federal defense in an action brought in state court, the defendant has the right to have the validity of that *defense* determined in federal court in accordance with federal law. "At the same time, the invocation of removal jurisdiction by a federal officer does not revise or alter the underlying law to be applied." *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981). Just as in a diversity action, therefore, the federal court can and must apply the underlying state law, but only to the extent that a federal defendant's official immunity does not otherwise shield that defendant from the operation of state law.

III. THE REMOVAL OF THE CASE BELOW ON BEHALF OF NIH FROM STATE COURT TO FEDERAL COURT WAS NECESSARY AND PROPER SO THAT THE "AGENTS AND OFFICERS" OF NIH, AGAINST WHOM RELIEF WAS SOUGHT, COULD BE DEFENDED IN FEDERAL COURT.

Petitioners, when they filed their state court action, named NIH as a defendant and sought relief not only against NIH, but against also its "agents, officers, representatives, employees." Pet. App. A-31-32.

The Civil District Court for the Parish of Orleans on December 29, 1988 issued a temporary restraining order against Tulane, the only party then served, which provided as follows:

> IT IS ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys', placed in their keeping by the National Institutes of Health and/or the Institute for Behavioral Research." IBR App. A.

After the case was removed to federal court, petitioners moved to restrain "NIH and their agents, attorneys, and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys.'" IBR App. B.

The District Court granted the motion and issued a TRO which provided:

> "IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys, and servants, from inhumane treatment, or euthanasia or other destruction of monkeys known as the 'Silver Spring Monkeys'." IBR App. B, at 2.

It was clear that petitioners were seeking to preclude NIH and its employees, including its Acting Director, Dr. Raub, from taking specified actions with respect to the Silver Spring Monkeys. Pet. App. A-31-32. As the Fifth Circuit concluded, ". . . the planned euthanasia on the monkeys and accompanying research is in furtherance of NIH's statutory mission to conduct and fund biomedical research." 895 F.2d at 1062.[17]

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[17] The sufficiency of the "federal interest" as found by the court below is not now subject to review because "[t]he petition for a writ of certiorari [was] granted limited to Question 1 presented by the petition." Question 1 deals only with the removal. Question 2 dealt with the federal interest. Question 3 dealt with standing. See Section VIII.C, *infra*, p. 39.

The injunctive relief sought against the agents and officers of NIH would have precluded the conduct of Dr. Raub's official duties, and that of other NIH employees, and was thus a suit against the sovereign. *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *Portsmouth Redevelopment and Housing Auth.* v. *Pierce*, 706 F.2d 471, 473 (1983).

It is precisely in circumstances such as those present here, where sovereign immunity and official immunity may be at issue, that removal is required. *Willingham* v. *Morgan*, *supra*, at 407. As this Court observed in *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880), to deal with such threats to its operations "the general government" should not be "powerless" to protect its own interest by protecting the interests of its officers and agents in federal court since the government can only act through such officers and agents.

To hold otherwise would do violence to congressional intent. As was stated in *Jones* v. *Elliott*, 94 F. Supp. 567, 568 (E.D. Va. 1950), the federal officer removal statute

> ". . . accomplishes, with minimal confusion, the evident Congressional purpose that all suits against officers of the Government, for acts done within the ambit of their authority, be tried only in the courts of the United States. *State of Tennessee* v. *Davis*, 100 U.S. 257."

Even though the removal was sought on the basis that NIH as an "agency" was entitled to remove, and the trial court and the court below also justified the removal on that ground, the record establishes that—to track the wording of the statute, "a civil action . . . [was] commenced in a state court" seeking relief against officers of the United States, and it was removed to federal court.

Since the agents and officers against whom relief was sought were not named either in the caption or in the body of the "Petition for Declaratory and/or Injunctive Relief," Pet. App. A-30-32, there was no way the removal could have been sought in their names. However, it would be excessively formalistic to condition removal on the style of the case, rather than on the relief sought against federal officers. For example, in *Johnson* v. *Showers*, 747 F.2d 1228 (8th Cir. 1984), the Eighth Circuit allowed a Section 1442(a)(1) removal by an agency ". . . based on the government's unopposed view that the action should be deemed as one brought against FEMA's Director . . ." even though FEMA's Director was not named in the caption or body of the complaint. 747 F.2d at 1229.

In sustaining removal of a variety of proceedings not clearly "civil actions," courts have concluded that "the statute looks to the substance rather than the form of the state proceeding." *North Carolina* v. *Carr*, 386 F.2d 129, 131 (4th Cir. 1967) (state court contempt proceeding variously argued to be "criminal," "civil" or "sui generis," *id.*); *Kolibash* v. *Committee of Legal Ethics of W. Va. Bar*, 872 F.2d 571, 576 (4th Cir. 1989) (state bar disciplinary proceeding); *Nationwide Investors* v. *Miller*, 793 F.2d 1044, 1447 (9th Cir. 1986) (garnishment proceeding involving Army Air Force Exchange Service).

Additionally, substance rather than form dictates that a suit is regarded as one against the sovereign, even if the United States is not named as a defendant, if the effect of the judgment would be "to restrain the government from acting, or to compel it to act." *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963), quoting *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). Similarly, a suit should be regarded as being against a government officer or employee if its objective, as here, is to restrain an officer or employee, such as Dr. Raub, from acting, or compelling him to act.

In light of the important public policy considerations applicable to actions such as this one, the availability of removal to federal courts should be based on the reality of the relief sought. It should not turn on such irrelevant factors as the incompetence or deviousness of counsel who draft the petition.

Because relief was sought against NIH employees, the Fifth Circuit was correct in sustaining the removal under 28 U.S.C. § 1442(a)(1).

IV. WHETHER OR NOT AN AGENCY CAN REMOVE UNDER ALL CIRCUMSTANCES, REMOVAL SHOULD ALWAYS BE PERMITTED TO ENSURE THAT JOB-RELATED CLAIMS AGAINST FEDERAL EMPLOYEES ARE HEARD IN FEDERAL COURT.

The federal officer removal statute ensures that job-related litigation involving federal employees is heard in federal court. Removal by an agency is proper to achieve this purpose even if agencies are not entitled to remove under all circumstances.

For example, in *Boron Oil Co.* v. *Downie*, 873 F.2d 67 (4th Cir. 1989), an employee of the Environmental Protection Agency ("EPA") was subpoenaed to testify in a state court trial. EPA's motion to quash the subpoena was denied. EPA then

> "promptly removed the subpoena proceeding (but not the underlying civil action) to the United States District Court . . ." 873 F.2d at 68.

The Fourth Circuit found nothing objectionable in having the validity of the subpoena tested in federal court after removal by EPA.

In *Loftin* v. *Rush*, 767 F.2d 800 (11th Cir. 1985), a state court summons of garnishment was served on Rush's employer, the United States Navy. Subsequently, a default judgment against the Navy was secured. The judgment had the effect of changing the United States from a stakeholder into a debtor. *Id.* at 804. The Eleventh Cir-

cuit did not question the removal by the Navy of the state court action to federal court. 767 F.2d at 802. The removal ensured that an action involving the disbursal of Treasury funds by employees of the Navy would be heard in federal court. *Id.* at 804-5.

These principles are particularly applicable to all actions seeking injunctive relief, such as in this case. In all actions against a federal agency, an injunction against it would also be binding on its "officers, agents, servants, employees . . ." by virtue of the provisions of Fed. R. Civ. P. 65(d), and similar provisions applicable in state courts.

The reach of an injunction is nationwide and extends to non-parties with knowledge of the injunction whereever located. As stated in *Waffenschmidt* v. *Mackey*, 763 F.2d 711 (5th Cir. 1985):

> "The nationwide scope of an injunction carries with it the concomitant power of the court to reach out to non-parties who knowingly violate its orders" 763 F.2d at 717.

Clearly, the relief sought and the TRO issued by the District Court in Louisiana extended to the highest levels of NIH in the Washington, D.C. metropolitan area and restrained official conduct by the Acting Director of NIH, Dr. William F. Raub.

Even if the petition did not, as here, specifically seek relief against the officers and agents of the agency, they nevertheless would be bound by an injunction against the agency if they had knowledge of it. In such circumstances only removal by the agency could protect its unidentified agents and employees from being bound by a state court adjudication.

V. THE THIRD CIRCUIT REMAND ORDER IN THE *LOVELL* CASE CAN BEST BE EXPLAINED BY THE POST-REMOVAL ELIMINATION OF ANY FEDERAL INTEREST.

Petitioners are correct that the district courts are divided on the question of whether a federal agency can remove a case to federal court under 28 U.S.C. § 1442(a)(1).

The Courts of Appeals are also divided on this question. The Fifth Circuit, in the opinion below and in other cases, the Fourth Circuit in *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 68 (4th Cir. 1989), the Eighth Circuit in *Johnson* v. *Showers*, 747 F.2d 1228 (8th Cir. 1984), and the Eleventh Circuit in *Loftin* v. *Rush*, 767 F.2d 800, 802 (11th Cir. 1985), have held or assumed that the objective of the removal statute can be better achieved by permitting agencies, as well as their officers, to remove cases to federal court under 28 U.S.C. § 1442(a)(1). Only the Third Circuit has articulated the opposite view. *See Lovell Mfg., Div. of Patterson-Erie Corp.* v. *Export-Import Bank of the U.S.*, 843 F.2d 725 (3d Cir. 1988).

The *Lovell* court concluded that the phrase in Section 1442(a)(1), "person acting under him," means that an "officer" under whom a person could act can remove, but that an "agency" cannot because an "agency" is not a "him" under which a person could act. 843 F.2d at 733. The court also stated ". . . we cannot read a statute to say what it does not say . . ." *Id.* This hyperbole is not convincing. Taken literally, the statute provides that "any officer of the United States or *any agency* [*of the United States*]" may remove. The *Lovell* court, to reach its result, had to in effect change the statute to read, "Any officer of the United States or *any officer of* any agency of the United States" may remove. The court has, in effect, added the words "any officer of" before "any agency." In so doing, the court has limited and qualified

the plain language of the statute: *"any agency thereof" (meaning of the United States) may remove.*

Similarly, petitioners, in purporting to describe the statute, change its "any agency thereof" phrase to read "an officer of an agency." Pet. Brief at 9. This hardly can be said to be following "the statute itself," an approach petitioners claim to advocate. *See* Pet. Brief at 8.

The Third Circuit's parsing of the statute should properly be regarded as dicta or, at best, an alternative holding. As stated in *New Jersey Dep't. of Envtl. Protection* v. *Gloucester Envtl. Management*, 719 F. Supp. 325, 334 (D.N.J. 1989),

> "That reading was only dicta, or, at most, an alternative holding. After the appeals court concluded that section 1442(a)(1) must be read to prevent agencies from invoking it, it went into a lengthy analysis of why it lacked jurisdiction under that section even if Eximbank properly removed the case under section 1442(a)(1) as a federal agency."

The *Lovell* case involved a suit against the Export-Import Bank of the United States ("Eximbank") and the Foreign Credit Insurance Association ("FCIA"), an association of private insurance companies formed to support Eximbank's statutory mandate of promoting United States exports. 843 F.2d at 727. One claim by the exporter, Lovell, was against FCIA on a commercial risk policy. A second claim was against Eximbank on a political risk policy. *Id.*

Shortly after the case was removed by Eximbank from state to federal court, Lovell dropped the political risk policy claim against Eximbank. Accordingly, the litigation then was "predominantly, if not exclusively, a state law claim against an association of private insurance companies." 843 F.2d at 728, 732. Eximbank's only involvement was based on a separate reinsurance agreement with FCIA to which Lovell was not a party. *Id.* Thus Eximbank was only a "nominal defendant" and as the court observed ". . . no reason appears why Eximbank has not been formally dismissed from this case." 843 F.2d at 731 n.8.

At the time of the remand order Lovell's suit could not have resulted in a judgment against Eximbank. Eximbank's "tangential interest" [18] could only have been in not having a reinsurance contract claim made by FCIA against the United States, presumably in the United States Claims Court under 28 U.S.C. § 1491. Even in the event of such litigation there could not have been a judgment for Lovell against Eximbank, but only against the United States. Nor could Lovell have secured relief against an officer of Eximbank either in the then pending case or in follow-up litigation.

Since, as the Third Circuit concluded, "the purpose of a section 1442(a)(1) removal is to protect federal officials from unfriendly state forums . . . for conduct performed under color of federal office," it reasoned that it was doubtful that allowing removal where relief could be secured only against private insurance companies would serve any such purpose. 843 F.2d at 734 n.13. Accordingly, a remand to state court was directed. 843 F.2d at 735.

Additionally, after the claim against Eximbank had been dropped there was no longer an "act under color of such office" at issue in the proceeding, and therefore no reason for it to remain in federal court.

The court properly concluded that it had discretion to direct a remand to state court of what had become "a non-federal suit" that "simply does not belong in federal court." *Id.* at 734.

There is no holding in *Lovell* that should lead this Court to preclude removal, where, as here, relief is specifically sought against officers and agents of a federal agency involving conduct directly related to their employment.

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[18] 843 F.2d at 733.

VI. THE WORD "PERSON" IN THE SECTION 1442(a)(1) PHRASE "PERSON ACTING UNDER HIM", INCLUDES BOTH AGENCIES AND TULANE AS JURIDICAL PERSONS ENTITLED TO REMOVE.

A. NIH Is a "Person" Entitled to Remove.

In *National Audubon Soc'y* v. *Department of Water*, 496 F. Supp. 499 (E.D. Cal. 1980), the court was called upon to determine if the Bureau of Land Management could be considered a juridical person acting under the direction of the Secretary of Interior, and if the Forest Service had similar status, being under the direction of the Secretary of Agriculture, and were thus "persons" entitled to remove under Section 1442(a)(1). *Id.* at 503.

In its analysis the court first concluded that the meaning of the statute was not "plain and unambiguous." *Id.* at 508.

The court also found the case law at the time to be "scanty and inconclusive." *Id.* Relying on this Court's teaching in *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969) that "section 1442(a)(1) must not be given a narrow grudging interpretation" and that "the Federal Government itself[] require[s] the protection of the federal forum." *id.*, the court, held as follows:

> "It is with these principles in mind that the court addresses the issue presented. As the Supreme Court notes, the United States can only act through its officers and employees (i.e. human beings). In like manner its agencies may only act through human beings. Although clearly the historical origin of Section 1442 was the protection of individual officers, its purpose has been broadened by amendment and now may be seen to rest on a 'federal interest' (*Willingham*, *supra* at 406, 89 S. Ct. at 1815) and is an 'incident of federal supremacy' (*Id.* at 405, 89 S. Ct. at 1815). Given the values now recognized as the underpinning of Section 1442, and the broad reading the court must give the section, *it appears*

> *that the word 'person' might reasonably be read to encompass the government's agencies*" (emphasis supplied). 496 F. Supp. at 508.

The court noted that for some purposes, the word "persons" may include corporations, municipalities, or foreign governments. *Id.* at 507 n.7. Under Section 1442 (a)(1) corporations and entities other than individuals have been considered to be "persons" acting under the direction of a federal officer and entitled to remove. *Group Health Inc.* v. *Blue Cross Ass'n*, 587 F. Supp. 887, 890 (S.D.N.Y. 1984).

For example, on this basis removal has been allowed by a national bank authorized to maintain facilities on military bases, *Texas* v. *National Bank of Commerce*, 290 F.2d, 229, 231 (5th Cir. 1961), *cert. denied*, 368 U.S. 832 (1961); by a quasi-public Puerto Rican telephone corporation assisting federal agents conducting telephone wiretaps, *Camacho* v. *Autoridad De Telephonos De Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989); by a private insurance company under contract with the government to administer social security benefits, *Kunstler* v. *Occidental Life Ins. Co.*, 292 F. Supp. 532 (C.D. Cal. 1968); by a professional corporation of attorneys funded by OEO, *Gurda Farms, Inc.* v. *Monroe County Legal Assistance Corp.*, 358 F. Supp. 841 (S.D.N.Y. 1973); by a corporate bus tour operator under contract with the Secretary of Interior, *District of Columbia* v. *Landmark Tours Serv. Inc.*, 411 F. Supp. 1002 (D.D.C. 1976); by the National Association of Securities Dealers conducting disciplinary proceedings against by a broker-dealer as "an agent or arm of the SEC," *Braun, Gordon & Co.* v. *Hellmars*, 502 F. Supp. 897, 902 (S.D.N.Y. 1980); by a medical service organization under contract with the Secretary of Health, Education and Welfare Department to treat Medicare patients, *Allen* v. *Allen*, 291 F. Supp. 312, 313 (S.D. Iowa 1968); and by a local dam authority operating floodgates under the direction of the United States Army Corps of Engineers, *Teague* v.

Grand River Dam Authority, 279 F. Supp. 703 (N.D. Okla. 1968).

In the context of this case, NIH, as a part of the Public Health Service, 42 U.S.C. § 203, can be considered to be a person acting under the direction of the Secretary of the Department of Health and Human Services. 42 U.S.C. § 202 provides,

> "The Public Health Service in the Department of Health and Human Services shall be administered by the Surgeon General under the supervision and direction of the Secretary."

If a local dam authority acting on verbal instructions from the Army Corps of Engineers can be a "person" within the meaning of the statute, a government agency statutorily required to follow the instruction of the Secretary of Health and Human Services should also be a "person" acting under "an officer of the United States" and entitled to remove. Such an interpretation serves to protect the federal interest.

Primate League contends that inasmuch as Congress defined the word "person" to exclude "agencies" in the Administrative Procedure Act, a similar exclusion should apply with respect to Section 1442(a)(1). Pet. Brief at 9-10. However, the meaning of the word "person" must depend on the context. The Administrative Procedure Act deals with such subjects as the rights of persons "suffering legal wrong because of agency action . . . ." 5 U.S.C. § 702. Viewed in that context it would make no sense to protect agencies from themselves by defining them as persons. However, the legislative history makes it clear that action by "persons" can constitute "agency action." In other words, "persons" can be "agencies" within the meaning of the APA. As stated in the Attorney General's Manual on the Administrative Procedure Act at 9 n.1 (1947),

> "The legislative history of section 2(a) illustrates . . . [i]t is necessary to define agency as 'authority' . . . 'The word "authority" is advisedly used as

> meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau) because *the real authorities may be some subordinate or semi-dependent person or persons* within such form of organization.' (Sen. Doc. p. 196). See also H.R. Rep. p. 19 (Sen. Doc. p. 253)." (Emphasis added.)

Defining the term "person" to include governmental entities is not uncommon. For example, Primate League in its request for the production of documents served on NIH defined the term "person" and "persons" to include the Department of Health and Human Services and government entities as follows:

> "Unless other specified, the following definitions shall apply to all sections of these Interrogatories and Requests for Production of Documents.
>
> 1. The terms 'you' or 'your' or 'NIH' means the defendant, National Institutes of Health, and all representatives *or other persons acting on behalf of defendant including U.S. Department of Health and Human Services.*
>
> 2. *The terms 'person' and 'persons' refer to all individuals and entities*, including corporations, division, partnerships, joint ventures, trusts, associations, *and any other business, governmental, or legal entity*, including all trade names of these." R. 000300. (Emphasis added.)

B. Tulane Is a "Person" Entitled To Remove

It also follows from this analysis that Tulane, having contracted with the Acting Director of NIH to assist NIH in the care of the animals, and having been sued in state court to preclude it from carrying out its contractually mandated functions, would also be a "person" acting under an officer of the United States entitled to remove to federal court under Section 1442(a).

The fact that Tulane could have removed, even though it did not do so, but could in the future do so if it were

necessary, is a further indication that the protection of the removal statute afforded in this case was in accordance with the statute's purpose.

VII. PRIMATE LEAGUE COMPLETELY IGNORES THE FACT THAT IT FILED A SUIT IN WHICH IT SOUGHT AND IN WHICH IT SECURED RELIEF AGAINST OFFICERS OF NIH.

Primate League, in its brief, seeks to categorize the issue before the Court as whether an agency, as distinguished from a federal officer, may remove under Section 1442(a)(1). *See, e.g.*, Pet. Brief at 8. Nowhere do they even acknowledge that in their Petition they sought relief against "agents and officers" of NIH and that they sought and secured a TRO in the District Court against NIH and its "agents, attorneys and servants." See Sections II and III of this brief.

However, Primate League does acknowledge that removal is proper with respect to actions "*involving natural persons.*" Pet. Brief at 8. This is such an action, involving as it does, a prayer by Primate League for relief against "agents and officers of NIH." Pet. App. A-32.

Petitioner Primate League also argues that removal jurisdiction should be no broader than original jurisdiction since an expansive interpretation would permit federal district courts to hear all cases in which the United States is a party, or which "implicates a cognizable federal interest." Pet. Brief at 16.

This argument misses the point. Even under a narrow interpretation of the removal statute, removal jurisdiction must be broader than original jurisdiction in order that federal officers sued for acts performed under the color of their office, on exclusively state law causes of action, may assert their immunity and other defenses in federal court. *Willingham* v. *Morgan*, 395 U.S. 402 (1969), was exclusively a state tort law cause of action which this Court held to be properly removed. Other cases have upheld the removal of state court contempt

proceedings, *North Carolina* v. *Carr*, 386 F.2d 129, 131 (4th Cir. 1967); state bar disciplinary proceedings, *Kolibash* v. *Committee of Legal Ethics of W. Va. Bar*, 872 F.2d 571, 576 (4th Cir. 1989); and state criminal proceedings, *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981). Whether or not agencies can always remove, or only when necessary to protect federal officers from litigating in state courts, is a separate question.

Only if agencies could remove in all circumstances would the federal district courts have removal jurisdiction over all the actions nominally against agencies but essentially against the United States, though such cases would still be limited by Section 1442(a)(1) to disputes involving an "act under color" of a governmental office, *cf. National Audubon Soc'y* v. *Department of Water*, 496 F. Supp. 499 (E.D. Cal. 1980), and a federal defense, *Mesa* v. *California*, 484 U.S. 121, 136 (1989). This would not expand the jurisdiction of the federal courts as would the elimination of the federal defense requirement urged by the Solicitor General in *Mesa*.

VIII. PETITIONERS HAVE CHALLENGED THE FIFTH CIRCUIT'S DECISION ON ISSUES EXCLUDED FROM THE GRANT OF CERTIORARI.

A. Certiorari Was Granted Only as to Issue One, the Removal

In their Petition for a Writ of Certiorari, petitioners sought review of the Fifth Circuit's decision with respect to three issues. The first question presented for review was the removal from state to federal court. The second was the sufficiency of the federal interest. The third related to petitioners' federal court standing including the *res judicata* effect on the jurisdictional issue to be accorded the Fourth Circuit decision. This Court granted the writ only with respect to issue one, the removal. Arguing additional issues is improper. *Irvine* v. *California*, 347 U.S. 128, 130 (1954); *Greyhound Corp.* v. *M.T. Hood Stages, Inc.*, 437 U.S. 322, 337 n.21 (1978);

Brunswick Corp. v. *Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 484 n.8 (1977).

In the Petition, Primate League argued that "[i]mplicit in the [Fourth Circuit's] ruling was a determination that Section 1442(a)(1) does not establish federal jurisdiction over any action brought against a federal agency." Pet. 11. They also argued that the principle of *res judicata* required this result. *Id.* at 12. These same arguments are repeated at pages 17-19 of their merits brief. However, certiorari was not granted with respect to the jurisdictional issue.

B. In any Event, Petitioners Misconstrue the *Res Judicata* Effect of the Fourth Circuit Opinion

Petitioners misconstrue the implications of *International Primate Protection League* v. *Institutes for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986). They argue that the refusal of the court to take jurisdiction over their state law claims against NIH implied a determination that removal of a similar action under Section 1442(a)(1), when filed in a Louisiana state court, would not be proper, and that *res judicata* precluded relitigation of the jurisdictional issue in the Louisiana action. Pet. Brief at 17-19.

But the Fourth Circuit case did not involve Section 1442 in any respect. The removal, exclusively under Section 1441(a), was based on the existence of a federal question. Since, before trial, standing was found to be lacking as to the federal claims, the state law claims were dismissed rather than remanded in accordance with the rule of *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715 (1966).

The situation is entirely different when a case is removed under Section 1442(a)(1). To protect the interest of federal officers, and the federal government, the entire case is removed and state law issues are decided in federal court even in the absence of a federal question,

notwithstanding that the action would not be within the original jurisdiction of the federal court. *Mir* v. *Frostburg*, 646 F.2d 342, 344 (9th Cir. 1980).

Consequently, there was no *res judicata* effect favorable to petitioners.

Once the removal was effected, Article III principles of standing become applicable to the state claims, as the court below held. 895 F.2d at 1061. Since Primate League was again seeking custody of the monkeys, *res judicata*, if anything, precluded relitigation of the Fourth Circuit's determination that petitioners lacked federal court standing. *Cf. Robinson* v. *National Cash Register Co.*, 808 F.2d 1119, 1124-25 (5th Cir. 1987).

C. The Sufficiency of the Federal Interest Is Not Within the Scope of the Grant of Certiorari with Respect to Removal, Issue Number One

In their Petition for Writ of Certiorari in issue number two, Primate League argued that the federal interest had not been sufficiently established. Pet. at i. In Section E of their merits brief, Primate League again argues the sufficiency of the federal interest. Pet. Brief at 19-23. Since the grant of certiorari was limited to the removal, issue number one, the federal interest question should not be considered.

D. Primate League Misstates the Record with Respect to the Detailed Documentation of the Federal Interest That Was Before the District Court and the Court of Appeals

Petitioners quote from the transcript of a May 3, 1989 court hearing for the proposition that the record contained no documentation of any federal interest in the Silver Spring Monkeys. Pet. Brief at 21. They charge that NIH "refused to document its interest." *Id.* From this faulty premise they contend that "[o]n appeal, then, the Fifth Circuit had nothing before it that would have established NIH's interest in the case." *Id.* at 22.

However, the following declarations and affidavits bearing on the federal interest were filed in the District Court:

1. ***Declaration of Dr. William F. Raub, of NIH, IBR App. C***

This declaration sets forth that after the termination of the Maryland criminal proceedings "NIH continued to care for the animals." The declaration also recites NIH's transfer of the monkeys to Tulane's Delta Finance Center, and attaches as Exhibit B the contract between NIH and Tulane for the care of the monkeys by the Delta Center. The costs incurred by both IBR and NIH are set forth.

2. ***Second Declaration of Dr. William F. Raub, R. 102-5***

In his Second Declaration, Dr. Raub expanded on NIH's custodial interest in the monkeys dating back to October 1981. R. 102-3. He also reviewed NIH's financial interest in the monkeys. R. 103-4. In describing NIH's research in the monkeys he explained,

> "NIH is a component of the United States Department of Health and Human Services. It has an annual budget in excess of seven billion dollars which is expended, pursuant to statutory authority, for the conduct of biomedical research at private and public institutions throughout the world. In furtherance of its statutory research mission, NIH has an interest in the important knowledge that can be gained from these unique animals. This knowledge, which can be gained through humane, non-painful procedures conducted as part of and following the euthanasia procedure involving deep surgical anesthesia, is important as it may lead to substantial improvements in rehabilitation therapy for those who have suffered brain or spinal cord damage. The animals are a unique resource for such research because of the length of time since they were deafferented and because of recent developments in scientific knowledge and methodology. Such research would also fulfill the research purpose for which the animals were obtained by IBR with funds from a grant awarded by NIH and would ensure that the animals had not been subjected to the experimental deafferentation and its consequences in vain. In pursuing this research interest, NIH is acting in accordance with a recommendation made in March 1988, by a panel of independent experts in veterinary care, the behavior of non-human primates and neurology." R. 104-5.

3. ***The Affidavit of Dr. Peter Gerone, NIH App. A***

Dr. Peter Gerone, in his affidavit, describes as follows Tulane's role:

> "In accepting the Silver Spring monkeys in June of 1986, on behalf of Tulane University, it was my understanding that we would aid the National Institutes of Health (NIH) in its role as the custodian of the monkeys which are legally owned by the Institute for Behavioral Resources, Inc. (IBR) of Washington, D.C.
>
> "Although my staff and I have been involved in making evaluations and recommendations regarding health and well-being of the Silver Spring monkeys, the final decisions regarding clinical care have been made and will continue to be made by the owners, IBR, and the primary custodians, NIH."

4. ***The Declaration of Dr. Joseph V. Brady, NIH App. B***

Dr. Joseph V. Brady, President and Chairman of the Board of IBR, explains that "the NIH custody of the animals has been maintained with the consent and cooperation of the IBR, although we have never signed a document formalizing the custody arrangement." The declaration contains the following statement concerning the research to be conducted in connection with the planned euthanasia:

> "We were consulted by the NIH regarding the proposed euthanasia of three of the animals and we fully concur with the NIH decision. We strongly support the research that would be conducted in conjunction with the euthanasia. We believe this research will benefit rehabilitation therapy, that it will fulfill the function for which the animals were obtained by IBR and will ensure that their long period of maintenance in a deafferented condition has not been in vain."

These affidavits and declarations were before the District Court and were part of the record transmitted to the Fifth Circuit. The federal interest was more than adequately documented.

CONCLUSION

For the reasons stated above, the opinion below should be affirmed.

Respectfully submitted,

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February 1991